

Australian & New Zealand Education Law Association

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Keynote Address

The Teaching Profession: Over regulated? Under regulated? Regulatory failure?

Introduction

- 1 There appears to be inevitable tension between the regulation of professions by Governments keen to satisfy perceived public interest in the 'consumption' of services which professionals provide to other members of society and what those who devote their lives to the practice of those professions, often at considerable personal sacrifice, expect that the practice of their professions will bring them and require of them. Nowadays, we repeatedly see investigations of things like cost/benefit; the measurement and comparison of outcomes; and transparency in decision making of all kinds, which result in changes to the regulation of professionals and outcries over what emerges and whether it is appropriate and/or necessary.
- 2 Teaching professionals are not alone in their concerns over the way in which their profession and its work is regulated. The theme of this conference could just as readily be taken up by other professions - doctors, accountants and lawyers readily spring to mind. And it is not just the professions. Scratch any industry and you will soon find similar

concerns – those who work in the media, banking, finance and public sector areas such as local government, energy, health, emergency services, all would have views about the regulation which impinges on the work which they pursue.

- 3 In an address given to the Medico-Legal Society of Victoria in May 2009¹ Chief Justice French discussed the difference in the legal environment which existed in 1933, when a former Chief Justice gave a similar address, compared to that which exists today. His Honour remarked at how statutes have overtaken us in that time, noting that in 1935 there were only some 350 Commonwealth Acts in force, covering less than 3,000 pages. Today we have individual acts which each occupy more than 3,700 pages. Clearly our society's enthusiasm for regulation is not confined to the teaching profession.
- 4 What does distinguish the teaching profession, it seems to me, is the fundamental and pervasive role which it plays in our society. All of us need to be educated and nowadays, that is a need which begins before we start school and does not end with matriculation, or even with the acquisition of a degree. Advances in brain research are driving education at ever younger years. Continuing education is encouraged as our longevity increases and medical developments uncover the importance of mental activity throughout our lives, for long term health and well being. Our society's need for a competitive place in the world economy, achieved through an increasingly well educated workforce, is also well recognised and actively pursued. Many of us now pursue more than one career throughout our working lives and life long learning is increasingly required of many of us, especially as a condition of professional practice.
- 5 It certainly makes for an interesting life, both for teachers and all of their students!

¹Science and Judicial Proceedings: Seventy Six years on 2010 ALJR 244

- 6 It follows, inevitably, that over time more of our society's resources have been directed to education and our teaching professionals. Inevitably, it seems, the need, or desire to regulate the teaching profession will not go away any time soon, or indeed, ever.
- 7 The challenge for regulators is, of course, to get it right. They have to satisfy both society and those who work in the profession, using resources which are inevitably finite – what society can truly say that it can afford all of what it would wish to deliver its citizens?
- 8 Against that background, what light can I throw on the regulation of the teaching profession?
- 9 It seems to me that any regulation of professional practice can be a two edged sword.
- 10 I recently heard an address given by Lord Justice Leveson, who was speaking about the use of expert evidence in English and Welsh courts. His Honour spoke on the one hand about the need for true experts to be called to give evidence in legal proceedings, deprecating growth in the number of experts who have in fact retired from active practice in their field, but continue to give expert evidence, sometimes with very problematic consequences. He gave as an example one retired, but formerly leading professor of medicine, who become the subject of professional misconduct proceedings and had his name removed from the medical register, as the result of evidence he had given in a case where a woman was convicted of, in what the defence claimed had been a SIDS death². The conviction was set aside. His Honour urged that expert evidence should only be called from active clinicians.³ He also urged for a new system of accrediting and regulating experts called to give evidence, based on ongoing peer review, requiring renewed accreditation on a 4

² "The Expert Debate: Setting the Limits on the Use of Expert Evidence", The Right Honourable Lord Justice Leveson, 21 August 2010

³ Henderson, Butler, *Oyediran* [2010] EWCA 1268 at [208]

yearly basis; with experts being obliged to abide by a strict code of practise, with expulsion from the Register, for any breach of the Code. The obvious difficulty with such increased regulation of experts would appear to be finding any clinicians, or other experts practicing in their fields, who would have the time, let alone the interest, to go to the trouble and expense of gaining their expertise, continuing their clinical practice and also undergoing registration, in order to have the pleasure of giving evidence in legal proceedings. The system urged has obvious attractions, but would appear to come at the risk that courts could be deprived of receiving evidence from the true experts in a particular field.

- 11 The teaching profession is not immune from this type of conundrum. Recently we have seen in Australia a controversy over resistance to national educational initiatives such as NAPLAN testing and the information now publicly available on the "My School" website. These initiatives resulted in serious industrial disputation, before agreements were reached, which seem to have achieved a compromise between legitimate, but competing concerns of regulators, teaching professionals, the media and 'consumers' of educational services, namely in this instance parents. Decisions about these controversies can readily be found on the NSW Industrial Relations Commission website⁴ and those of other Industrial tribunals. Reasonable minds can certainly differ about such regulatory initiatives, their value and consequences.
- 12 The regulation of the teaching profession does throw up ongoing challenges for our society. It seems that we have managed some better than others and that there is one, which to my mind, requires further serious consideration.
- 13 I propose to touch on three broad areas:
 - misconduct and performance appraisal
 - safety

⁴ see for example *Department of Education and Training (NSW) v Teachers Federation (NSW)* [2010] NSWIRComm 55; (2010) 194 IR 340

- remuneration

The regulation of teacher misconduct and performance

- 14 In New South Wales in the 1990s, the Wood Royal Commission and its aftermath, saw not only massive repercussions for the NSW Police Force, but also a regrettable number of investigations into inappropriate contact between teachers and students. Legislative change, dismissals, reinstatement applications and very substantial changes to the way in which employers dealt with teacher misconduct all followed, driven by the work of the Royal Commission.
- 15 The terms of reference of the Royal Commission were extended in December 1994 to cover certain paedophile and pederast activity and in October 1996, they were further extended to include, amongst other things, 'the sufficiency of the monitoring and screening processes of Government departments and agencies to protect children in their care, or under their supervision, from sexual abuse'. The recommendations which emerged drove change, which affected the teaching and other professions and occupations which have contact with children in their work. No one could argue with the necessity for regulatory change, but there were certainly disagreements about the nature of those changes and their consequences.
- 16 A number of disputes about innovations in the processes adopted by Government and non-government school systems, by way of response to these developments, emerged before the NSW Industrial Relations Commission. Things settled down over time, but the public interest in teacher accountability for misconduct remains undoubted, particularly sexual misconduct. Media scrutiny remains high. We see regular reports of cases of teacher misconduct decades in the past, leading to successful prosecutions in the present, as well as dismissals and prosecutions resulting from more recent misconduct.

- 17 Current regulation and practices are in large measure driven by legislative initiatives such as the *Children and Young Persons (Care and Protection) Act 1998*, which has as its objects:
- "(a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and
 - (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and
 - (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment."
- 18 Section 27 imposes mandatory reporting obligations on teachers and other professionals and workers involved in delivering health care, welfare, education, children's services, residential services, or law enforcement to children. Licensing of children's services for children aged under 6 years is also provided for
- 19 There is now ongoing regulation of those who may engage in child employment, including teaching. The *Commission for Children and Young People Act 1998* established a system designed to ensure that certain people are not any longer able to be employed in child related employment such as teaching. This includes those who have committed offences of violence against children and serious sex offences. This legislation creates offences in the case of employers who employ prohibited people in child related employment, as well as offences in respect of such people who obtain such employment. A system of background checking was established, as well as a review system, under which the Administrative Decisions Tribunal and the NSW Industrial Relations Commission, may

make orders which effectively permit an otherwise prohibited person to engage in child related employment.

- 20 There have been individual cases where reportable behaviours has led to dismissal and subsequent unfair dismissal applications, which it is unnecessary to explore. Teachers employed in the Government sector who become the subject of such disciplinary measures still have the right to bring unfair dismissal applications to the NSW Industrial Relations Commission under the *Industrial Relations Act* 1996. The Commission has power to order reinstatement, re-employment or money compensation, if a case is made out. Fair Work Australia has similar powers for those employed in the private sector. Since the abolition of the Federal *WorkChoices* legislation, with the enactment of the *Fair Work Act* 2009 (Cth), it is fair to say that concerns about the regulation of the teaching profession, so far as regulation of dismissal generally is concerned in the federal field, has largely died down. There has never been much concern with this aspect of the NSW system.
- 21 The prohibition of employment of certain people in child related employment does tend to throw up unusual cases from time to time, but in my experience they generally tend to reveal a regulatory mechanism operating to strike an appropriate balance between the interests of children and those who are employed to work with them. An example of a case where an application for orders permitting employment of a prohibited person succeeded, is '*L' and The Commission for Children and Young People and anor* [2008] NSWIRComm 195, where orders were made in favour of a 57 year old applicant, who was employed as an Assistant Principal of a school, who he had been convicted of offences involving acts of indecency committed more than 40 years earlier, when he was aged 15 years. The Commission for Children and Young People and the Director-General of Education and Training entered appearances in the proceedings, but neither consented to, nor opposed the application, which was granted.

- 22 Some cases have undoubtedly thrown up problems with the legislation or practices established in order to meet the obligations imposed by these statutory regimes. In some cases such difficulties are highlighted in a Commission or Court decision, which hopefully leads to some ameliorative response.⁵ There will be differing views as to whether adequate steps have been taken to deal with such situations. Unquestionably there is room for the view that the time has come to review these legislative innovations and how they are operating in practice, in order to ensure that the intended system of checks and balances they sought to establish, is operating well and that problems which have been identified, have been taken on board and redressed.
- 23 The *Teaching Service Act* 1980 now deals with teacher performance in Part 4A Management of conduct and performance. Its objects appear in s 93A as:
- "(a) to maintain appropriate standards of conduct and work-related performance for officers in the Teaching Service,
 - (b) to protect and enhance the integrity and reputation of the Teaching Service,
 - (c) to ensure that the public interest is protected."
- 24 Under this Act mechanisms for dealing with allegations of misconduct are provided, as well as performance reviews and measures directed towards performance improvement, as well as dealing with unsatisfactory performance and disciplinary action after conviction of serious offences.
- 25 Performance assessment of schools and teachers is another subject which society constantly revisits. I doubt that our society will ever reach the point where we are satisfied that we have regulation of this area exactly right. Undoubtedly there will be ongoing controversy and further

⁵ see for example *NSW Teachers Federation v Department of Education and Training* [2003] NSWIRComm 145; (2003) 121 IR 177

change, but there is room for some confidence in the regulation which we presently have.

- 26 In my own school days I remember the preparation involved for the Inspector's visit to the School, by the whole School, not just the teachers whose class performance was to be inspected. That system was abandoned in NSW in the public sector where it operated, with teacher performance for many years not the subject of such regular formal assessment. There followed ongoing disputation over the way inadequate teacher performance was identified, addressed and resolved. The result was legislative and policy regulation, as well as award provision underpinned by legislative dispute resolution mechanisms and unfair dismissal regimes provided by the *Industrial Relations Act 1996*.
- 27 Awards like the *Crown Employees (Teachers In Schools And Related Employees) Salaries And Conditions Award 2009* regulate areas such as teacher performance management. Private employers exercise similar rights, pursuant to contracts of employment, awards, agreements and legislation.
- 28 Changes in these areas have also had other, perhaps unlooked for, positive consequences. These regulatory changes such as these have been accepted as reflecting changes in the work, skill and responsibilities which teachers are called upon to exercise in their work. In *Re Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004* [2004] NSWIRComm 159; (2004) 134 IR 71, for example, a Full Bench of the NSW Industrial Relations Commission accepted that the changes which resulted from these innovations on the work of teachers, supported the conclusion that since 1990, the changes in the nature of the work, skills and responsibilities of the teaching profession in the Catholic School sector, had been far reaching and profound, warranting substantially increased remuneration. Similar recognition has driven increases in the remuneration of other teachers.

- 29 While there is always room for improvement and inevitably there will continue to be change in these areas, it seems that the regulation of this aspect of the teaching profession is working relatively well, given all of the competing interests which such regulation has to address.

The provision of safety

- 30 In 1983 NSW adopted a new approach to ensuring safety, with the enactment of the *Occupational Health and Safety Act*. The onerous obligations there imposed were revisited, and tightened up in some respects, with the enactment of the *Occupational Health and Safety Act* 2000. The safety of those who work in schools has been an area where regulation has had an increasing role to play. Regrettably, in some cases this has been the result of situations where teacher and student safety has been put at risk by the conduct of students.
- 31 In part, safety issues arising in schools over time appears to have reflected increasing numbers of students with disabilities of all kinds, who came to participate in both mainstream schools, as well as in schools established to provide education for students who engage in 'challenging behaviour' and are not suitable for mainstream schooling. This change reflects the positive impact of legislation such as the *Disability Discrimination Act* 1992 (Cth), which by 2001 had resulted in the Catholic School sector for example, in a 43 per cent increase in the numbers of students with disabilities attending Catholic schools⁶. In some educational systems it was a change which was not always accompanied quickly enough, by the resources necessary to meet the challenges which resulted.
- 32 Safety issues in schools also appears to have reflected certain changed attitudes to teaching, teachers and the rights and roles of children and adults in society. The challenge which these developments threw up for regulators, school authorities and teachers cannot be underestimated.

⁶ see *Re Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004 and other awards*[2004] NSWIRComm 159; (2004) 134 IR 71 at [46].

The result, over the years, was a number of disputes brought to the NSW Industrial Relations Commission over safety concerns, as well as criminal prosecutions for breaches of the *Occupational Health and Safety Act*.

- 33 NSW employers have an absolute obligation to ensure safety at work by the onerous requirements imposed upon them by the *Occupational Health and Safety Act*. Individual employees, including teachers, also have obligations under the legislation. A review of the cases decided by the NSW Industrial Court, throws up worrying examples of circumstances in which prosecutions have gone forward where teachers' safety was not ensured, as well as a number of prosecutions brought by unions, where one might have expected that a prosecution would have been brought by the prosecuting authority, WorkCover of NSW.⁷ That, too, is a concern. The effectiveness of any legislative scheme such as this depends not only on its observance, but also its enforcement.
- 34 One thing is certain, prosecutions have helped drive substantial procedural change at system and school levels, as well as heightening the emphasis placed on safety at schools and on teacher training in safety. In my experience prosecutions have also driven greater individual attention to safety.
- 35 The most cursory review of decided cases gives a picture of the enormous resources which have been devoted to meeting the obligation to ensure safety, at the same time as giving increased access to education to the least able members of our society. Undoubtedly these children and young people require support and they are receiving it as the result of hard work and great sacrifice on the part of those prepared to step up and pursue the challenges which life as a teacher can bring.

⁷ See for example *Barry Johnson v State of New South Wales (Department of Education and Training)* [2006] NSWIRComm 275; *Inspector Kilpatrick v The Crown in the Right of the State of New South Wales (Department of Education and Training)* [2006] NSWIRComm 167

- 36 One of the things which the decided cases also show, is that despite all of the work put into developing policies and procedures and the education and training given as to their implementation, there are individuals who pursue the provision of education, at the expense of the safety of those who provide it. While laudable in one sense, that is an approach with the legislative scheme does not permit.
- 37 Inevitably, human beings being as they are, it is difficult to see a time when the balance between ensuring safety and providing education for those who need it, will be achieved in such a way that prosecutions under legislation like the *Occupational Health and Safety Act* will no longer be necessary.
- 38 Given that inevitable challenge, again, it seems to me that this aspect of regulation is also operating reasonably in NSW, so far as teachers are concerned. There are those who hold strongly different views. They will soon be put to the test.
- 39 In July 2008, the Council of Australian Governments signed an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. A National OHS Review Panel reported on an optimal model OHS Act and in July 2009 Safework Australia and the Safework Australia Council were established. In December 2009 the Workplace Relations Minister's Council endorsed model OHS legislation, due to be implemented by December 2010.
- 40 The model Act creates three categories of offences, each of which apply to corporations and individuals, including teachers. Category one offences, where a corporation has a health and safety duty; engages in conduct that, without reasonable excuse, exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and is reckless as to the risk of death or serious injury or illness to that individual, attracts a maximum penalty of \$3 million (s 30). Category two offences, where a corporation has a health and safety duty; fails to comply with the duty; and

the failure exposes an individual to a risk of death or serious injury or illness, attracts a maximum penalty of \$1,500,000 (s 31). Category three offences, where a corporation has a health and safety duty; and fails to comply with the duty, attracts a maximum penalty of \$500,000 (s 32). There are in each case also offence provisions with lesser penalties fixed for individuals and a higher penalty for those individuals who commit an offence 'as a person conducting a business or undertaking or as an officer of a body'.

- 41 While the penalty regime is a considerably higher one than under present NSW legislation, unlike that legislation, the offences created under the model Act are not absolute and oblige prosecutors to prove matters which presently fall on defendants to prove, when raising defences. Whether and how the legislation will be enforced, remains to be seen.
- 42 It does, however, impose wide ranging health and safety duties on individuals and corporations in a variety of situations, including in relation to:
- workers while at work (s 18 which imposes a 'primary duty of care');
 - those who have management or control, in whole or in part, of a workplace (s 19);
 - those who have the management or control of fixtures, fittings or plant, in whole or in part, at a workplace (s 20);
- 43 Officers of bodies with duties and obligations under the Act also have a duty to exercise due diligence to ensure that the body complies with that duty or obligation (s 26). Workers (s 27) and others at a workplace (s 28) have duties to take reasonable care for their own health and safety; and to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons; they must comply with any reasonable instruction to comply with the Act; and in the case of workers, with reasonable policy or procedures of the person conducting the

business or undertaking relating to work, health or safety that has been notified to them. Penalties for individuals are to range from \$2,000 to \$300,000.

- 44 How this new system will prevent and deals with safety breakdown when it occurs in schools and other places where teachers work, and whether it is as effective as the current NSW legislation, remains to be seen. That will depend on the attitude of those on whom obligations are imposed by the legislation; how safety risks which arise in schools are dealt with under a less onerous regime; and whether and how effectively the legislation is enforced.

Remuneration

- 45 While I am relatively positive about the other two areas which I have touched on, I think that there is room for the view that there is a need for the regulation of teacher remuneration to be the subject of a fundamental reconsideration by regulators, at least in some important areas.

What does business think?

- 46 At the 2020 Summit in Canberra in 2008, Alan Moss, the former head of Macquarie Bank was apparently surprised at teachers' salaries, the Sydney Morning Herald then reporting:

"After arguing passionately for an official government declaration recognising "Australia's most valuable natural resource - the collective talent of our people", Mr Moss said he had been shocked to learn the best-paid teachers could only expect to take home \$65,000 a year at most.

"It was actually a revelation to me," said the banker who earned \$33.5 million last year. A note was hurriedly added to the butchers' paper list of areas requiring attention: "Teacher and academic salaries."⁸

⁸ "Shock of real world for business chiefs", Jessica Irvine, Economics Correspondent, April 21, 2008

- 47 Business has a view about this. That is not surprising. It, after all, has to work with the products of our education system. In the Business Council's 2008 *Teaching Talent* paper, it focused on what Australia needs to do to raise the quality of teaching in all schools, recommending, amongst other things:

"A new remuneration structure that rewards excellent teachers and demonstrates that, as a society, Australia values the teaching profession."

- 48 In the final 2020 Summit report, in the Productivity Agenda education, skills, training, science and innovation, the 'top ideas' agreed included:

"1.8 Reward excellence in teaching: focus on the connections between quality teaching and productivity.

1.9 Celebrate teaching: celebrate the vocation and contribution of teaching.

1.10 Teaching first: establish a national program to attract talented graduates and career-switchers into teaching, and reward teachers for working in national priority areas, including in disadvantaged communities, in remote areas and in subjects with teacher shortages."

- 49 Perhaps the global financial crisis might be thought to have had a negative impact on the drive for improved remuneration for teachers, but that was not so, at least for big business. A glance at the Business Council's website will show ongoing interest in how teachers are remunerated.⁹ How that can be translated into Government and private employers turning scarce resources into appropriate pay for teachers, under current regulatory regimes, is a more difficult question.

⁹ see <http://www.bca.com.au/Default.aspx>

Present regulation of teacher pay

- 50 NSW teaching professionals are employed in various public and private sectors: early childhood services including long day care centres and preschools; schools; and in the tertiary sector, business colleges, TAFE and other post secondary institutions which do not result in the conferring of degrees on students, as well as universities.
- 51 Unlike other professional areas, few teaching professionals work in a marketplace where the sole determinant of their remuneration is what they can command as the result of their skills, work performance, experience, reputation or even their negotiation skills. Even in times of teacher shortages, increased pay is not what a teacher is necessarily able to command because they either work for Governments who do not engage in over award negotiation, or for employers who operate in an industry reliant on Government subsidies for viability and are thus not in a position which readily accommodates the possibility of over award payments for teachers.
- 52 Many teachers' employment, previously regulated by State awards, is now regulated by awards made by Fair Work Australia under the *Fair Work Act 2009* (Cth)¹⁰. There is in NSW now a largely, although not completely, public/private sector divide. On 1 January 2010, NSW employees of sole traders, partnerships, some trusts, as well as non-trading corporations moved into the national workplace relations system, to join the employees of trading corporations already regulated by that system. Former State awards applying to such teachers are now known as 'state reference awards', which will continue to apply until 1 January 2011, when the appropriate federal modern award will commence to apply to them.

¹⁰ See *Fair Work Amendment (State Referrals and Other Measures) Act 2009*

- 53 The relevant modern awards appear presently to be the *Educational Services (Teachers) Award 2010*¹¹, the *Higher Education Industry-Academic Staff-Award 2010* and the *Educational Services (Post-Secondary Education) Award 2010*.
- 54 The *Educational Services (Teachers) Award 2010*, as made to operate from 1 January 2010, applies to teachers employed in the school education industry, children's services and early childhood education industry by national system employers, with various exceptions (see cl 4). This award has a 12 level classification structure, with salaries ranging from \$38,283 to \$53,493, with an additional 4% payable to those working in early childhood centres operating at least 8 hours per week for 48 weeks of the year (see cl 14). A 3 year trained teacher starts on level 1, a 4 year trained teacher on level 3 (\$40,201) and a 5 year trained teacher on level 4 (\$41,701) (see cl 13). In June 2010 the rates were increased to \$39,640 for a 3 year trained teacher, \$41,558 for a 4 year trained teacher, \$43,058 for a 4 year trained teacher and \$54,850 at level 12.
- 55 The NSW *Crown Employees (Teachers In Schools And Related Employees) Salaries And Conditions Award 2009*¹², by way of comparison, has a 13 step classification structure for teachers, with rates from January 2010 of \$49,370 for a 3 year trained teacher starting on step 3, \$54,749 for a 4 year trained teacher on step 5 and \$57,565 for a 5 year trained teacher starting on step 6 (see cl 3.5). The level 13 rate is \$81,656 (see Schedule 1).
- 56 Surprisingly, teachers' remuneration appears to have gone backwards, even from the position which surprised participants at the National Summit in 2008!

¹¹see [\[PR988937\]](#)

at http://www.fwa.gov.au/documents/modern_awards/30Jun10/MA000077_30Jun10.pdf

¹² see at

[http://www.lawlink.nsw.gov.au/irc/IRCGazette.nsf/\(PublicationsByTitle\)/A462796066B3C792CA2576D50077235B?OpenDocument](http://www.lawlink.nsw.gov.au/irc/IRCGazette.nsf/(PublicationsByTitle)/A462796066B3C792CA2576D50077235B?OpenDocument)

- 57 That is not the end of the apparent difficulty. Mention must be made of another issue which arose as the result of the modern award process. There was a question as to whether teachers employed in the early childhood sector should be covered by a teachers award, or by the award that applies to other employees in the industry, the *Children's Services Award 2010*¹³. The Full Bench resolved that issue by deciding that they should be covered by the teaching award. Because of different transitional provisions inserted into the *Children's Services Award* and the *Educational Services (Teachers) Award 2010*, the end result was that the award rate for teachers would eventually be \$70 a week less than for a diploma-qualified child care worker. Not surprisingly this led to an application to vary the transitional provisions of the *Educational Services (Teachers) Award*!
- 58 These rates may also help explain recent consideration by the NSW Government as to whether NSW common rule industry awards should continue to operate, even though they now have a reduced level of practical operation, given the operation of the national system and its modern awards. I understand that this is an issue which has been raised for consideration in the current State Wage Case and may result in legislative amendment of the NSW *Industrial Relations Act 1996*.
- 59 The majority of teaching professionals in NSW, particularly those employed in schools, are employed in public sector employment, which remains regulated by NSW awards. Those award tend to operate in an environment where there is almost no above award negotiation or payment of remuneration. In the past public sector awards have had an influential impact on negotiations for private sector award making, as well as for some rather limited above award agreement making between teacher unions and certain private employers. Some NSW awards applying to certain private schools, for example, have in the past contained higher rates than those provided by awards which applied to Government

¹³ see [PR991088](#)

schools. Some private schools also pay above award rates by direct agreement with teachers.

- 60 The stand out exception was in the early childhood sector, where most teachers in NSW have not always been remunerated on a basis which replicates the recognition given in other sectors to their educational qualifications, teaching experience and/or superior teaching performance. Even with 12% increases over 3 years awarded in 2009 by a Full Bench of the Commission in relation to the NSW award, these teachers will be paid up to 15% less than school teachers in 2011.¹⁴
- 61 In NSW the resulting rates, from September 2010, for teachers employed under the *Teachers (Non-Government Early Childhood Service Centres Other Than Pre-Schools) (State) Award 2009*¹⁵ range from \$44,701 for a 3 year trained teacher, \$47,532 for a 4 year trained teacher, to a maximum of \$69,825. There is no additional rate for a 5 year trained teacher.
- 62 The problem for those who will be in future come to be employed as teachers by employers who have moved into the federal system, is that they will be covered by the even lower rates provided by the new *Educational Services (Teachers) Award 2010*. There are transitional arrangements which apply in relation to those employed by employers to whom State awards with higher rates previously applied, which will cease to operate after 1 July 2014.¹⁶ When that occurs, it is difficult to see an obvious way forward under the current regulatory system. It appears that teachers will then be covered by an award with very significantly lower minimum rates than those provided by State awards.

¹⁴ see *Re Teachers (Non Government Early Childhood Service Centres other than Preschools) (State) Award 2006* [2009] NSWIRComm 198; (2009) 191 IR 14, where increases of 16% were awarded over 3 years, still leaving teacher's salaries up to % below those of teachers employed in schools (at ?).

¹⁵ See at

[http://www.lawlink.nsw.gov.au/irc/IRCGazette.nsf/\(PublicationsByTitle\)/7A0775BA9B9681E8CA2576D5007B69DC?OpenDocument](http://www.lawlink.nsw.gov.au/irc/IRCGazette.nsf/(PublicationsByTitle)/7A0775BA9B9681E8CA2576D5007B69DC?OpenDocument)

¹⁶ See Schedule A to the Award, cIA3

- 63 For teachers employed in early childhood centres at NSW TAFE Colleges, the picture is very different. There, under the *Crown Employees (Teachers In TAFE And Related Employees, Bradfield College And Teachers In TAFE Children's Centres) Salaries And Conditions Award 2009*¹⁷ in 2010 salaries range from \$49,125 for a 3 year trained teacher, \$52,237 for a 4 year trained teacher in early childhood, to a maximum of \$76,734 (see Schedule 8). For TAFE teachers themselves, the salaries range from \$68,853 to \$81,656 (see Schedule 1).
- 64 By comparison, the modern federal *Educational Services (Post-Secondary Education) Award 2010* applies to the post-secondary educational services industry, but not teaching in a university. Schedule B deals with the classification of academic teacher, under which a Level A academic teacher is normally expected to have completed four years of tertiary study or equivalent qualifications and experience and may be required to hold a relevant higher degree. This scale commences at \$39,552, with a maximum on the 8 level scale of \$49,594. Level B and C academics are also provided for, with an absolute maximum salary of \$68,557. Teachers and tutors/instructors are dealt with in schedule C, where provision is made for a variety of differing educational institutions. Category C teachers (3 year trained) have a minimum salary of \$38,089.50; category B teachers (4 year trained), a minimum of \$38,869.40; and category A (5 year trained), a minimum of \$39,657.10, with a maximum salary on the 12 level scale of \$49 594.85.
- 65 The other modern award to consider is the *Higher Education Industry-Academic Staff-Award 2010* which applies to academic staff employed in the higher education industry throughout Australia, that is by educational institutions providing undergraduate and postgraduate teaching leading to the conferring of accredited degrees and performing research to support and inform the curriculum. This award has a 5 level classification

¹⁷ [2009] NSWIRComm 169; (2009) 189 IR 197 see at <http://www.lawlink.nsw.gov.au/irc/ircgazette.nsf/webviewdate/C7296?OpenDocument>

structure, each level with a number of steps, with pay rates ranging from \$40,908 to \$89,900.

- 66 Differences in these salaries no doubt reflect many things. The very differing levels of all of these various rates is one thing, but the amount of those rates by comparison to each other and the seeming decrease in minimum rates for teachers employed in NSW, is another.
- 67 There are other awards to which reference could be made, but the point is that current teacher salaries in Australia appear to remain unsatisfactory, particularly for parts of the early childhood sector, certainly if the views of business people who ultimately come to employ those who are educated by teachers are to be given any weight.

Historical reasons for inadequate pay

- 68 The reasons for the current situation are reflective of the move to the national system and are also, in part, historical. It is impossible to examine every sector, but the early childhood sector provides a good illustration of historical problems. In NSW current award rates reflect employer resistance to teachers' remuneration being fixed at a level commensurate with that paid to similarly qualified and experienced teachers employed in schools and even certain preschools – for example those attached to schools and TAFE Colleges.
- 69 In 2001, I found that salaries for teachers in the private early childhood sector in NSW had fallen behind by about 26%, by comparison to 1990. In 1990 employers had entered into an agreement which resulted in salaries 4% higher than those applying to school teachers, in the case of teachers employed in long day care centres and the same as teachers employed in schools, in the case of other centres¹⁸. The 1990 picture was the result of an agreement that teachers employed in early childhood centres, who

¹⁸ see *Re Teachers (Non-Government Pre-Schools) (State) Award and Another Award* [2001] NSWIRComm 355; 120 IR 3 at [6] to [12]

worked for longer hours daily and over the course of a year than preschool and school teachers, should be paid 4% more. Over time that agreement fell away. It has never been recovered, as far as I am aware, although it has been repeatedly pursued by teachers and the unions which represent them.

70 In 2001, I ordered that minimum award wages for teachers in the private early childhood sector be increased by 20% over three years, in the face of a claim by the union that there should be a 26% increase and by the employers that there should be no increases at all. In 2006, the NSW award parties reached an agreement as to a 13.5 % salary increase over three years.¹⁹

71 In 2009, the union's claim was for an immediate 2.8% increase and three further increases of 5%, in the face of teacher salaries in the early childhood sector having again fallen some 21 to 27% behind school teacher salaries, at a time when significant teacher shortages were again being experienced in this industry. Any increases at all were again opposed by private employers. Three increases of 4% were finally awarded by the NSW Industrial Relations Commission, a Full Bench of the Commission finding:

"70 ... It is undeniably the case that there has been a loss of relative wages by teachers under the subject Awards compared to their counterparts in government schools. Teachers in the early childhood sector had substantial parity with teachers covered by the school teachers' awards in 1990, only to fall significantly behind from the mid 1990s. This situation was partially remedied by the decision of Schmidt J in 2001. However, early childhood teachers have once again fallen significantly behind school teachers. As compared to early childhood teachers, teachers employed in schools and government preschools earn 27 per cent more than teachers in non-government preschools and 21 per cent

¹⁹ See *Re Teachers (Non-Government Early Childhood Service Centres Other Than Pre Schools) (State) Award* [2006] NSWIRComm 4.

more than teachers in long day care.

- 71 It has also been established there is a critical shortage of early childhood teachers and that the shortage has been exacerbated by the disparity in wages. Ms Cheeseman described the shortage as being 'at crisis point'. The Commonwealth has estimated that without appropriate intervention, there will be a shortfall of at least 7000 early childhood education and care workers in Australia by 2013: Early Childhood Policy, June 2009. Public consultations conducted by the Department of Employment Education and Workplace Relations ('DEEWR') in August and September 2008 found that a failure to address workforce issues was a key restraint to the achievement of reform in early childhood education. One of the issues consistently raised in the consultations was that:

The interrelated issues of low wages, high turnover and difficulty attracting and retaining staff were seen as being of paramount importance.

See DEEWR, *A National Quality Framework for Early Childhood Education and Care*, (January 2009) at p4.

- 72 Clause 52 of the 2004 Regulation requires one teacher for each centre of 30 - 40 children, two teachers for centres with 40 - 60 children, and three teachers in centres with 60 - 80 children. However, it appears that the admitted shortage of teachers is forcing many long day centres and preschools to apply for exemptions from this requirement. Alternatively, the strategy has been to lower the number of places to below 29, so no teacher is then required. We agree with the applicant's submission that these solutions are contrary to the public interest, given the Federal Government policy and funding support for more quality teaching in the early childhood sector.
- 73 The Regulation Impact Statement for Early Childhood Education and Care Quality Reforms released by the Council of Australian Governments ('COAG') on 3 July 2009 provides that by 2013 it is proposed that both preschools and long day care centres with 25 children would have to have to employ at least one university qualified teacher and services with less than 25 children would be required to have access to a qualified teacher for educational leadership. An additional objective has been set that every child should have access to a

program of 15 hours of early childhood teaching in the year before formal schooling commences. It follows that both of these measures will significantly increase the demand for teachers in the early childhood sector and, as the applicant submitted, if not otherwise addressed will worsen the shortage situation.

74 It would also appear that turnover in teacher positions in early childhood is high, in the vicinity of 25 per cent per annum: *National Children's Services Workforce Study*, August 2007 at p127. Ms Press noted in her evidence that consistency and stability of staff were important features of effective teaching in early childhood. We agree that high staff turnover seriously undermines the quality of education and care that may be offered.

75 The evidence that the wages disparity has contributed significantly to the shortage of teachers is, in our opinion, overwhelming and not really challenged by the respondents. We refer to the evidence of Ms Cheeseman, Ms Press, Ms James, Ms Connors, Ms Connell, Ms Fanning and Ms Jacobsen. What Ms Connors said was striking:

Since 2005 there has been a reduction in the number of early childhood education students studying at the University of Newcastle who are choosing fourth year intern placements in child care centres and preschools. *They quote the inequality of pay between schools and child care, longer working hours, shiftwork, and less holidays. There are currently 60 students in 2009 completing internships from the University of Newcastle. Of those, 8 have chosen to do their internship in early childhood centres (our emphasis).*²⁰

72 This rather curious, ongoing resistance to increasing teacher remuneration appears to reflect the fact that over time, a large part of the education provided to under school age children in the early childhood sector came to be delivered though a small business model, rather than through a non-profit model, such as that legislatively required in NSW to be delivered by schools and that in fact delivered by schools, TAFE, Local Government,

²⁰ Final Report p 13

community and charity based operators in the early childhood sector. That picture was, of course, altered dramatically by the advent of the failed ABC Learning exercise. On my understanding, this was the result of a policy approach which favoured delivery on a for profit basis, which was actively pursued by governments, increasingly from the 1990s, particularly by federal governments. The aim was to ensure more rapid growth in the number of places which could be offered to preschool aged children, than the not-for-profit based model was expected to be able to provide.

- 73 That policy initiative appears to have had a number of drawbacks, not the least of them that there was little control exercised by government over where new privately operated centres were located. The result was undersupply of places in some areas and oversupply in others. That situation contrasted unfavourably to a completely different approach adopted by Government in the aged care sector, where there was a similar need to drive a rapid increase in aged care places available to the community, but control was exercised over where new places were developed. The different policy approach adopted for child care appears to have come at a very considerable cost.
- 74 Over time, as the result of various government decisions, an increasingly large part of the early childhood sector came to be operated by private owners on a for profit basis, rather than the not-for-profit basis of operation statutorily required for all schools. That situation, and the significantly increased funding directed to the early childhood sector, came to make these small businesses attractive targets for acquisition. The spectacularly unsuccessful ABC Learning built its business in considerable part through the acquisition of these small businesses. Their sale may have been profitable for the proprietors who sold, but the model ultimately failed spectacularly, in regrettable circumstances.
- 75 The Senate Education, Employment Workplace Relations Committee November 2009 report on the Provision of Childcare shows that in 2007/08 in NSW, some 27.8% of childcare places were provided by community-

based organisations, 69.5% by the private sector and only 2.7% by Government.²¹ This pattern helps to explain certain of the ongoing difficulties which this sector constantly faces.

- 76 This Committee's report also outlined the rise and fall of ABC Learning, from an operator of a number of centres in suburban Brisbane in 1988, to a company listed on the Australian Stock Exchange in 2001, which acquired the other three listed Australian operators to become by 2008 Australia's largest provider of childcare, holding around 20% of the overall long day care market, providing care to over 100,000 children and employing around 16,000 staff. The operating business model relied on a guaranteed revenue stream from federal government subsidies, which, while subject to a parental income test, were usually paid direct to centres.
- 77 The potential that the reduced levels of teacher pay which will increasingly come into operation in NSW, while fee subsidies in the early childhood sector remain unaltered, could drive the development of another ABC Learning situation, appears to need some thought.

Attraction/retention problems

- 78 One of the ultimate results of the approach which encouraged growth in the for profit, private sector operation of early childhood education, has been ongoing problems in attraction/retention of teaching staff. The problems in this sector have been even greater than the difficulties confronting the school sector from time to time²².
- 79 That no doubt helps explain new federal government initiatives like the HECS-HELP Benefit for early childhood education teachers, reducing the amount they have to be repay by a maximum of \$1600 for eligible employment undertaken in the 2008-09 income year, to be indexed in

²¹ See Report Table 1.2 *Estimated Percentages of Childcare Services by Provider Type, 2007-08*

²² see for example the discussion in *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* [2004] NSWIRComm 114; (2004) 133 IR 254at [45] to [72]

future income years and available for a maximum of 5 years²³. This is designed to encourage graduates to take up employment in the sector in regional centres, with indigenous and other disadvantaged groups.

- 80 The prospects of success which initiatives such as this might have, is open to question, given the rates of pay which those interested in pursuing such a teaching career face in future.

Social initiatives

- 81 The pursuit of those prepared to take up employment in this sector is being driven by an important social initiative. In November 2008, the Council of Australian Governments endorsed a new National Partnership Agreement on Early Childhood Education, under which Commonwealth and State and Territory governments have committed to ensuring that by 2013, all children will have access to a quality early childhood education program, delivered by a four-year university-trained early childhood teacher, for 15 hours a week, 40 weeks a year, in the year before formal schooling²⁴. The agreement recognises teacher shortages as an impediment to its implementation, but practical engagement with the problem created by teacher salaries, as a driver of such shortages seems absent.

- 82 The importance of teachers' work is certainly recognised, the agreement noting:

"6 Early childhood is a critical time in human development. There is now comprehensive research that shows that experiences children have in the early years of life set neurological and biological pathways that can have life-long impacts on health, learning and behaviour. There is also compelling international evidence about the returns on investment in early childhood services for

²³ see at

http://www.deewr.gov.au/Earlychildhood/Policy_Agenda/EarlyChildhoodWorkforce/Pages/HECSHELPe nefit.aspx

²⁴ The agreement can be found at

http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_early_childhood_education.pdf

children from disadvantaged backgrounds, including the work of Nobel Laureate James Heckman."

- 83 The work of Heckman can be seen in papers such as *The Productivity Argument for Investing in Young Children*²⁵. There it is argued that research has established that:

"On productivity grounds, it makes sense to invest in young children from disadvantaged environments. Substantial evidence shows that these children are more likely to commit crime, have out-of-wedlock births and drop out of school. Early interventions that partially remediate the effects of adverse environments can reverse some of the harm of disadvantage and have a high economic return. They benefit not only the children themselves, but also their children, as well as society at large.

Investing in disadvantaged young children is a rare public policy with no equity-efficiency tradeoff. It reduces the inequality associated with the accident of birth and at the same time raises the productivity of society at large."

- 84 Such investment requires teachers prepared to undertake the work necessary to deliver the early intervention which the 2008 Agreement promised. In 2010, teachers willing to work in early childhood still seem not to be abundantly available, at least in NSW. Why not?

Regulatory failures?

- 85 What can be made of this regulatory picture?
- 86 It certainly seems arguable that the private for profit model of childcare and education provision for preschool age children has been less successful than it needs to be, both for children who are the recipients of those services, as well as for those who work in providing care and education for those children and society as a whole. That this model is

²⁵ James J. Heckman and Dimitriy V. Masterov see at http://jenni.uchicago.edu/human-inequality/papers/Heckman_final_all_wp_2007-03-22c_jsb.pdf

successfully delivering the education which it is universally recognised is needed for Australian children of this age, is not apparent.

- 87 It is also arguable that our regulatory systems have not delivered necessary rates of pay for teachers, if our society's aims are to be met.
- 88 The rates of pay fixed by current modern awards suggest that there will be ongoing difficulties flowing from inadequate remuneration for teachers, particularly those needed for the early childhood sector.

A world class system

- 89 This seems entirely regrettable. The challenge recognised in the 2020 Summit Final Report, so far as education is concerned included:

"Universal access to high-quality education for early childhood development is an essential starting point. All Australians need to be equipped from birth throughout life by providing a world-class system for care, learning and schooling."

- 90 A world class system requires teaching professionals of the highest calibre which Australia can produce. In order to attract people with the necessary talents to the profession and to encourage them remain there, once highly experienced, their work must be appropriately remunerated, by comparison to other professions which can attract such people's interest.
- 91 Unless those of us who are equipped to provide such a world class system are attracted to ongoing employment as teachers, this is a pipe dream for Australia. Until the remuneration which teachers command for their work is fixed at a level which attracts those of us able to command much greater remuneration for our services elsewhere, Australia will not be able to meet this ambition. Altruism alone won't be enough.

Declining teaching quality and declining student performance?

- 92 Australia has a significant interest in ensuring that current problems are redressed.
- 93 The OECD's 2009 Enhancing Educational Performance In Australia Report²⁶ found that Australia has a relatively low level of expenditure on pre-primary education, which accounts for only 0.1% of GDP compared to the OECD average of around 0.5%. There is also a difficulty that what is being spent on education is not presently being well spent enough. The OECD found that while over the past 3 to 4 decades, real per-child education spending in Australia has increased substantially, children's test scores have failed to increase. The report found at pp12 -13:
- "14 Participation in pre-primary programmes remains low, with concerns about disadvantaged groups.
- 15 ...
16. Only 42% of the children aged three to four were enrolled in pre-primary programmes in 2006, compared with approximately 70% in the OECD area on average and over 90% in certain countries including Belgium, France, Germany and New Zealand (Figure 5). While caution is required in interpreting these statistics,⁴ it is clear that Australia lags behind the best performing countries in this critical area. Despite positive developments over the past decade or so, only a third of children aged 0–5 years old attended Commonwealth-approved child-care facilities (excluding pre-school) in 2006 (SCRGSP, 2008). Attendance rates for the 0–5 age bracket ranged between 43% in Queensland to less than 27% in Western Australia and the Northern Territory. Regarding pre-schools, around 13% of four year-olds miss out on early childhood education, although there is significant variation across the states. Participation rates have improved only marginally since the beginning of the decade."

²⁶ see at

[http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=ECO/WKP\(2009\)19&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=ECO/WKP(2009)19&doclanguage=en)

94 The report identifies another problem for Australia, which may not be overlooked:

"37. Teaching quality constitutes a very important determinant of the variation of student achievement. Empirical evidence of a significant decline in the academic aptitude (literacy and numeracy standards are proxies for teacher quality) of new teachers and teacher students over the past two decades is therefore a source of concern. According to Leigh and Ryan (2008), the fall in the average pay of teachers relative to non-teachers with a university degree between 1983 and 2003, and the rise over the period in pay dispersion in non-teaching occupations (implying increasing returns to aptitude in such occupations), played a significant role in the deterioration in teacher quality. Recent developments in teachers' relative salaries do not stand out in the international context (Figure 8, left panel). Cross-country comparisons however provide clear evidence on the weak dynamics of teachers' salaries in Australia by showing no rise in pay after 15 years of experience, even though the initial remuneration is somewhat above the OECD average (Figure 8, right panel). Salary progression of public school teachers reflects the length of teaching tenure, rather than performance. Teachers reach the top salary band within nine years after graduation. Subsequent promotions usually involve administrative and management roles, reducing the attractiveness of becoming a teacher. A recent survey highlights the difficulty school principals face in filling vacancies with well-qualified teachers across all areas of study, with particular challenges in foreign languages, English, mathematics and sciences (ACER, 2007). More than 40% of secondary school principals stated that, to cope with shortages, they were requiring their staff to teach in areas outside their expertise, with around a quarter of them indicating that they had to resort to the recruitment of less qualified teachers. Attracting and retaining qualified teachers poses greater difficulties for schools in remote areas."

95 Any connection between declining teaching quality and declining student performance, cannot be ignored. The report found in relation to the performance of Australian students:

"19. Notwithstanding Australia's strong performance in standardised tests, the results from the PISA studies indicate that average reading scores fell significantly (in a statistical sense) between 2003 and 2006, reflecting mainly a decline in the scores of high achievers in 2006. Australia is the only country among the ones with above-average performance that experienced such a strong deterioration in students' reading performance (OECD, 2007b). The mathematical skills of Australian girls have also slipped, though the average level of performance in this domain remained statistically the same. Students "at risk" constitute another challenge to Australian schools. Evidence from the 2006 PISA study suggests that 13% of 15 year olds perform below the OECD scientific "baseline" proficiency (Figure 4, lower panel), with similar percentages in the case of mathematical and reading skills. Although this proportion is below the OECD average (around 20%), under-achieving students are still a matter of concern. Over the longer term, data from the Longitudinal Surveys of Australian Youth indicate that literacy and numeracy scores of students aged 14 (in grade 9) have failed to rise over the period 1975–98, and international mathematics tests of 13 year-olds (in grade 8) indicate no improvement over the period 1964–2003 (Leigh and Ryan, 2007). This pattern is common to many developed countries, most of which have also seen no improvement in test scores over recent decades (Gundlach, Woessmann and Gmelin, 2001). Particular attention needs to be devoted to reducing the gap in performance among students from disadvantaged backgrounds and indigenous students.⁸ An important goal of the National Reform Agenda is to increase both the proportion of young people who meet basic literacy standards and the levels of overall achievement. This requires a focus on both the quality and equity of student outcomes through initiatives discussed below, with measures to address learning difficulties in early childhood playing a prominent role (COAG, 2006). A particular challenge is to attract more young people to study mathematics and science, in light of the low level of interest in learning science expressed by the Australian students in the context of the 2006 PISA study."

Can current systems deliver necessary solutions?

- 96 What can be done? It would seem that proper remuneration for the work of teachers is a necessary step towards addressing the ongoing challenges which Australia faces. The question is whether current regulatory systems are capable of delivering solutions to the problem we seem to face, or whether governments will need to find new ways forward.
- 97 There seems but a slim possibility that either government or business will step up, either together or separately, to meet this challenge by agreeing to pay teachers, especially in the early childhood sector, on an above award basis, so as to eclipse the minimum rates provided by the current *Educational Services (Teachers) Award 2010*, let alone by State awards.
- 98 Perhaps new approaches need to be considered. Moving away from the for profit model in early childhood? Tying government fee subsidy direct to payment of teachers? Direct legislation for teacher pay?
- 99 Until new solutions to old problems are found and delivered, what can be achieved under current regulatory systems?

Work Value?

- 100 Federal modern awards are intended to provide 'a safety net of fair minimum wages'. In setting such wages s 284 of the *Fair Work Act 2009* requires, that account be taken:
- "(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
 - (b) promoting social inclusion through increased workforce participation; and

- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability."

101 Although work value cases directed at increasing minimum award rates of pay for teachers are still possible in the future, it is evident that past work value cases have not delivered a complete answer to the persistent problem of teacher pay, in either State or federal systems. Were it otherwise, current award rates would be higher.

102 In the case of the Federal modern awards, an explanation for the rates fixed is not easily found. None of the published decisions on the award modernisation exercise appear to provide an explanation of how the rates were actually fixed²⁷. No doubt the answer lies in the range of existing award rates which had to be accommodated in the award modernisation exercise. How future work value exercises, under either the federal or NSW system, can redress the current disparity and/or inadequacy of minimum award rates for teachers, is not easy to see.

103 The federal system envisages that awards may be supplemented by above award agreement making, underpinned by minimum award rates. There are also federal mechanisms to deal with the low paid, but it is hard to see that teachers will fall into this stream. The NSW system also encompasses such agreements. Historically there has been but little agreement making in this sector. There is no evidence to suggest that this will change in future.

²⁷ see decisions of 22 May 2009 (2009) AIRCFB 450 at [54] to [65]; 4 September 2009 (2009) AIRCFB 826 at [56]-[62]; 4 December 2009 (2009) AIRCFB 945 at [40]

- 104 Certainly there is no guarantee that the reduced award rates fixed by the federal modern awards will result in agreements that teachers should be paid higher rates, rather than Governments reducing subsidies, or private operators retaining any resulting savings to be used for other purposes or as increased profits, in the for profit areas.

Pay equity and its limitations

- 105 Australia does not have a particularly bad history, so far as pay equity is concerned, up to a point. But it is one which appears to have gone into reverse.²⁸ That there might be 'market failure' for teacher salaries of the kind discussed by experts who gave evidence in the *Equal Remuneration Principle* test case in NSW in 2000, reflective of the female dominance of the industry, clearly seems a possibility.
- 106 It follows that it is possible that pay equity cases, directed at removing gender based differences in award rates of pay and ensuring that work of equal or comparable value is rewarded by similar rates of pay, might provide a part of the answer for teacher pay, but it is unlikely to be complete. That is because in some industries, like teaching, minimum award rates tend to be actual rates paid and in others, which might provide comparators, they are only the legal minimum and actual rates are significantly higher.
- 107 There was a pay equity case run in NSW by the Miscellaneous Workers Union for childcare workers in 2006.²⁹ As the NSW Industrial Relations Commission's decision explains, that award applied to primary contact staff other than teachers, employed at pre-schools, long day care and out of school hour centres, as well as non-contact staff, such as cooks and cleaners. It was the first fully contested application brought under the equal remuneration principle, established by the NSW Industrial Relations

²⁸ see Committee Report at chapter 2 Setting the Scene

²⁹ see *Re Miscellaneous Workers Kindergartens and Child Care Centres and (State) Award* [2006] NSWIRComm 64; (2006) 150 IR 290

Commission in *Re Equal Remuneration Principle* [2000] NSWIRComm 113; (2000) 97 IR 177. That Union's claim was that the industry was overwhelmingly dominated by female employees whose wages had historically been undervalued.

- 108 It was a rather curious case, in many ways, not the least because there was a counterclaim made by certain employers, principally those who have historically also opposed increases in pay for teachers, that the rates of pay of child care workers should actually be reduced. That claim was rejected³⁰ and instead, increases of over 16% in the case of some classifications were awarded (although increases were rejected for other classifications, such as cooks, where no undervalue was established on the evidence.) The new rates were fixed by reference to rates fixed under teachers' awards, having in mind respective qualifications and work of the respective classifications under consideration.
- 109 It follows that the transitional provision problem in 2010 with the *Educational Services (Teachers) Award*, resulting in teachers being paid \$70 less than child care workers, now raises an especial irony!
- 110 As far as I am aware there has not been a pay equity case conducted for teachers in the childcare sector, let alone for teachers more generally, anywhere in Australia, but that this is an area where there might be further activity in future, is an obvious possibility.
- 111 In 2009, the House of Representatives Standing Committee on Employment and Workplace Relations conducted an Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce. Its Making it Fair report of November 2009³¹ reveals the complexity of pay equity issues and recognises shortcomings in the *Fair Work Act*, which it was recommended required very substantial amendment. Amendments proposed even included, for example, a

³⁰ see at [163] to [169].

³¹ see at <http://www.aph.gov.au/house/committee/ewr/payequity/report/front.pdf>

provision enabling orders to be made by Fair Work Australia in relation to all employees affected by a pay equity case, rather than being limited to the applicants for an order.

112 Fair Work Australia has the power to make equal remuneration orders³². The NSW Industrial Relations Commission also has power to hear pay equity cases. An application has been made to Fair Work Australia in relation to the social welfare area³³. Given the rates fixed for teachers by the *Educational Services (Teachers) Award* and other modern awards, as well as the submissions advanced to the Standing Committee in 2009 by teacher unions, amongst others, there seems to be a case for such consideration, at least in the early childhood sector.

113 Pay equity cases can raise considerations of comparable worth. Appropriate comparators are always debatable, but looking at comparisons used in past enquiries and cases, obvious rates to consider are those fixed by the *Professional Employees Award 2010*³⁴, which applies to professional engineers and scientists, amongst others. Under this award a 3 year degree graduate has a starting rate of \$39,625; a 4 or 5 year degree graduate a rate of \$40,640 and a maximum minimum award rate of \$57,619 is fixed

114 The immediate drawback of that comparison is that the *Professional Employees Award* is likely to contain rates which are true minima. Many of those covered by this award, perhaps the majority, earn salaries significantly in excess of the minimum award rates. That is not the case for teachers, especially in the early childhood sector, who in my experience in the majority of cases are likely to actually earn what the award prescribes as a minimum rate.

³² see Part 2-7 Equal Remuneration

³³ see information about the Equal Remuneration case on the Fair Work Australia website at <http://www.fwa.gov.au/index.cfm?pagename=remuneration&page=introduction>

³⁴ see at http://www.fwa.gov.au/documents/modern_awards/award/ma000065/default.htm

- 115 Existing pay equity mechanisms may be blunt tools for any industry where employees are, in reality, not able to command any above award wages. That may, of course, be reflective of an industry not generating earnings at a level sufficient to be able to afford to offer such pay. A sector like early childhood, which even when operated on a for profit basis is heavily dependent on government funding to operate viably, faces obvious difficulty in paying its staff salaries which adequately compensate them for the work which they perform, without further government support.
- 116 Still, that there is room for a pay equity type investigation in the case of teachers, seems open to consideration. Academics and other teachers employed in the rest of the tertiary sector also appear to provide challenges, although the picture there may be somewhat more mixed, given that there are some over award payments and things such as rights of private practice for certain academics, for example, which are absent in the case of those teaching in other sectors.

The challenge

- 117 The overall challenge for Australia remains. Achieving rates of pay for teachers which will attract the right people to the profession and not leave business people shocked to learn that nothing much has improved since 2008, when a maximum salary of \$65,000 was a revelation, or worse, that teacher salaries have actually gone backwards, especially for future entrants into the profession, appears to be a significant challenge.
- 118 With some timing issues, the picture in 2010 seems to look something like this:

	Modern Teachers (private sector) (plus 4% for early childhood working 48 weeks)	NSW early childhood (private sector)	NSW TAFE early childhood	NSW TAFE Teachers	NSW Govt Teachers	Mod Post-Secondary Education	Mod Academics	Mod engineers (private sector)
3 year	\$39,640 (\$41,225)	\$44,701	\$49,125	\$68,853	\$49,370	\$38,089.50 (teacher)	\$40,908	\$39,625
4 year	\$41,558 (\$43,220)	\$47,532	\$52,237		\$54,749	\$38,869.40 (teacher)		\$40,640
5 year	\$43,058 (\$44,780)	\$47,532	\$52,237		\$57,565	\$39,657.10 (teacher)		\$40,640
max	\$54,850 (\$57,044)	\$69,825	\$76,734	\$81,656	\$81,656	\$49,594.85 (teacher) \$68,557 (academic)	\$89,900	\$57,619

119 There appears to be no question that this picture permits future significant reductions in the minimum pay which teachers will be able to legally command for their services.

120 The challenge which a graduate teacher rate of \$39,640 presents, needs to be understood in a much broader context. The recently released Graduate Careers Australia Report³⁵ on graduate salaries in Australia, based on responses from 122,000 graduates showed that in 2009 the median annual starting salary for bachelor degree graduates was \$48,000. This undoubtedly reflects both graduates receiving only award rates of pay and those on above award rates. In engineering, the graduate starting salary was \$58,000. Later reports have shown that for a graduate engineer starting with a mining company, it is \$75,000³⁶.

121 This is a challenging picture.

³⁵ see at <http://www.graduatecareers.com.au/>

³⁶ See [New careers spark hot salaries](#), *Australian Financial Review*, 11 September 2010

Conclusion

- 122 The current picture does not seem to me to show particular overregulation of the teaching profession, certainly not by comparison to others. Under regulation might emerge, if new occupational health and safety legislation is not effective in ensuring teacher safety. The real challenge confronting regulators is achieving necessary change for teacher remuneration. The possibility of regulatory failure at a fundamental level, let alone by way of ensuring appropriate reward for superior teacher performance, requires active consideration, if all of Australia's considerable educational goals are to be achieved. After all, they rest in large measure on the work of teachers.
- 123 The 1970s is not so long ago, but perhaps they were both more direct and more poetic times. The challenge facing regulators cannot be better explained than it was by Justice Sheldon when he sat as a member of the NSW Industrial Relations Commission sitting in Court Session, which decided the *1970 Teachers case*³⁷. His Honour said in dissenting as to the amount of the increase then awarded:

"Teachers are certainly the biggest professional career industry group in the community. Their numbers are so large that any award materially increasing their salaries must necessarily involve a great sum of money but this fact is not a legitimate barrier to their right to receive remuneration commensurate with their work and its contribution to the welfare of the community. Education is the concealed mainspring in natural development and, more importantly, a vast contributor to the spiritual betterment of society. The heart of education is teaching. Buildings, equipment, high level planning and new educational philosophies are essential in an efficient and progressive system of education. But all this is meaningless waste unless it bears fruit in the classrooms where today thousands of individual teachers communicate with hundreds of thousands of individual children. All the departmental planning, organization and academic groundwork are channelled towards this personal

³⁷ See *In re Crown Employees (Teachers - Department of Education) Award* [1970] AR 345 at 521.

relationship and in the end education is made or broken on the anvil of the human efforts, qualities and ideals of these teachers. It must follow that, great as may be the cost of placing the salaries of teachers at a reasonable level, this is something which the conscience of the community must face. To do otherwise would be to exploit one section of the community in the supposed interests of all. Such an approach, originally based on the conception that some work is so vital that those who make it their vocation can be expected partially to live off their dedication, is today completely outmoded. It is certainly short-sighted. In truth the cost of providing reasonable salaries for teachers is, I believe, less a public burden than a public investment which must return very real dividends although, not being based on material values, they can never be quantified."

124 That challenge remains to be taken up.

The Honourable Justice Monika Schmidt
September 2010